No. 10382.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LETTIE LEE, INC.,

Respondent.

BRIEF OF RESPONDENT, LETTIE LEE, INC.

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The Issues.

The principal issues involved in the within proceeding are:

1. Are the cutters, slopers and trimmers the appropriate unit for collective bargaining;

2. Does the Union represent a majority of the unit; and

3. Has respondent been guilty of unfair labor practices.

The Board found that a unit consisting of all cutters, slopers and trimmers is appropriate [R. 74] and that the Union has a majority within the said unit [R. 75], and that respondent has been guilty of unfair labor practices.

We believe a brief statement of facts will be of assistance in determining the legal issues involved.

Statement of Facts.

Respondent is engaged in the business of manufacturing and selling ladies' dresses. It employs in connection with its manufacturing operations approximately between 115 and 120 persons. [R. 590.] These are divided generally into cutters, operators, pressers, examiners, drapers, cleaners, pinkers, finishers, designers and others engaged in the actual production and manufacturer of what eventually is the finished product manufactured by respondent. [R. 653; 592-608; 493-494; 513-523.] These employees are exclusive of office and clerical help and other employees engaged in non-productive functions.

The cutting deparement consists of an area partially enclosed by a partition approximately six or seven feet in height and open at one end. This partition does not extend from the floor to the ceiling. Within this area are the cutting tables and shelves upon which the materials are kept and the tools and instruments used by the cutters in the performance of their duties. [R. 593-594; 497-498.]

The persons working in the cutting room may be classified as follows:

Men cutters—Louis Swartz, Vito Cimarusti, Angelo Costella, Mort Litwin, Joe Sardo, Louis Baliber, Don Quinn, Nolan Berteaux and David Thain;

Slopers and Trimmers—Eunice Usher, Dorothy Richard and Katherine Lembke [R. 135; 137-138; 297];

Assorters or Bundlers—Sarah Giochetti, Marie Chavez, Frances Avila and Saloma Sesma [Resp. Ex. 3-C, R. 585]; and in addition to the foregoing, a stock girl whose duties are to supply the cutters with the various materials reguired by them. [R. 550.]

The evidence shows that the duties of the assorters or bundlers were to take the various pieces of cloth after they have been cut by the cutters, to assemble them correctly, to mark them accurately, to tie the various component parts of the garment into a bundle (from which the term "bundlers" is doubtlessly derived) so that when the various pieces reach the operators, the same would be ready to be sewn or assembled. The evidence clearly shows that the work of the bundlers is of extreme importance, and that if the bundlers do not correctly assemble the various portions or pieces cut by the cutters, that the garments will be incorrectly assembled and will be absolutely useless. [R. 494-496; 599-601; 548-549.]

We ask the court to bear in mind the testimony of Louis Swartz and of Samuel Bothman, the Secretary-Treasurer of respondent. Both of these witnesses testified in great detail as to the manner in which the operations of Lettie Lee, Inc., are conducted in respect to the manufacturing of ladies' garments. They testified that each production unit is entirely and completely dependent upon every other production unit; that the cutters do nothing more than cut material from a marker or pattern; that this operation is simply the placing of a marker upon the material, tracing around the same with a piece of chalk and cutting on the line so marked. When the cutters have completed their cutting operation, they have nothing but numerous pieces of cut cloth. These pieces go first to the assorters or bundlers, as previously stated, then to the operators, then in various and successive stages to the drapers, pinkers, examiners, cleaners, finishers, pressers and the various other component parts of the factory. We believe it is a fair statement that if any one of these various units or operations was eliminated, we would have no

finished product. Each depends upon the other, and each requires the work of skilled employees. [R. 496-497.]

Mr. Bothman also testified that in keeping with modern principles and methods in the dress manufacturing industry, respondent is so set up that the various operations required in the manufacture of a dress are assigned to those best qualified to perform that particular function; that no one man or woman performs all of the functions or even a small part of all of the functions necessary to the complete manufacture of a garment; that this system tends towards specialization and increases substantially the productive output of the factory, and that without such system it would be impossible for respondent to compete with the eastern manufacturers. [R. 658-667.]

Mr. Bothman also testified that the cutters no longer perform the functions or occupy the position of the cutters of fifteen, twenty or twenty-five years ago. [R. 594-596; 660-664.] Mr. George Wishnak, a representative of the International Ladies' Garment Workers' Union, testified on behalf of the Union that in the early days of the garment industry, the cutters were considered as the most highly skilled of all the garment workers; that they designed the dress, made the patterns, cut the material, and, in fact, saw the operation through from beginning to end. The obvious purpose of his testimony was to leave the impression that the cutters today occupy the same position in the industry and are in a class entirely by themselves above and beyond the other production workers in the factory.

Mr. Bothman testified that respondent's factory as it is set up and geared to function does not require high-grade or skilled cutters for the reason that its cutters are what are known in the trade as "choppers" [R. 596-597]; that their sole function is to mark the material from a marker and to cut around the lines so marked; that this function requires only the ability to cut around the chalk lines and to use the shears or the power cutting knife, the usual tools of the trade. It is for this reason that one man is given the responsibility of grading the patterns. This man was Louis Swartz and, when the volume of work justified it, he was assisted by Miss Usher. [R. 664.] None of the other cutters were required to have this skill or ability [R. 665], and none of the other cutters did any grading nor were the cutters required to make markers except upon rare and isolated occasions, and the work of making the markers was assigned to Mort Litwin. It thus clearly appears that with the exception of Swartz, Litwin and Miss Usher, the work required of the cutters was not highly skilled or specialized, and that they were simply choppers as that term is defined in the trade. [R. 597.]

It is the position of respondent that in determining the appropriate bargaining unit, the entire plant and all of the production employees of respondent must be taken into consideration. As the total number of production employees is substantially in excess of 100 (approximately 115 or 120), it is obvious that the Union, representing only six of the cutters, does not even begin to represent a majority of the production employees. We believe that

the authorities bear out our position that in a factual situation such as is here presented, the entire factory and all of the production employees constitute the appropriate bargaining unit, and that a small minority group such as the cutters, slopers and trimmers, is not the appropriate unit.

The respondent contends further that if the court should be disposed to hold that all of the production employees do not constitute the proper bargaining unit, that then the appropriate unit is the cutting room or cutting department of respondent's factory. This unit, as previously pointed out, consists of nine men, three women, and the four assorters or bundlers, a total unit of sixteen persons. As the Union represents only six out of this total of sixteen, it falls short of having a majority.

If the court should conclude that the bundlers or assorters are not to be considered in determining the unit appropriate for bargaining, and that the appropriate unit consists of the cutters, the slopers and trimmers, as found by the Board, then respondent submits that this unit consists of twelve persons, namely, the six members of the Union referred to in the complaint on file, the three women, Eunice Usher, Dorothy Richard and Katherine Lembke, and Louis Swartz, Mort Litwin and David Thain (on leave of absence at the time of the strike). As the Union represents only six of this group, it does not have a majority.

With respect to David Thain, the record shows that he is the oldest cutter in the employ of respondent [R.

446]; that in the month of January, 1941, he requested a leave of absence because of ill health; that the leave of absence was granted him; that he was told that whenever he returned, his old job would be open; that he returned to work in the month of December, 1941, resumed his former duties and is still in the employ of respondent. [R. 447-450; 576.] The record will further show that he did not engage in any other employment between January and December, 1941; that he went to his mother's ranch in Texas where he assisted with the work about the ranch and, as he testified, helped with the milking and other usual and customary ranch duties; that his purpose was to rest and improve his health, which he did, and having regained his health, he returned to his old job. [R. 452-454.] Under these circumstances, David Thain remained an employee while on leave, and must be counted as an employee of respondent for our purposes. The Board's finding to the contrary is unsupported by the evidence.

As to Katherine Lembke, the record shows and the Board has found that she was an employee of respondent on the date of the strike, July 22, 1941, although on a leave of absence for the summer. [R. 74.]

As to Miss Richard, the record is uncontradicted that she commenced her employment in June, 1941, and remained in the employ of respondent until sometime in December, at which time she left and has not since returned. It should be noted that she gave up her work at that time for the reason that she was expecting a child and decided to devote her time thereafter to her family. [R. 502-506.] It is clear without the citation of author-

ity that Dorothy Richard, having been continuously in the employ of respondent from June, 1941, to December, 1941, must be considered as an employee for our purposes, and the Board so found. [R. 74.]

Considering, therefore, that on the date of the strike, July 22, 1941, there were twelve cutters, slopers and trimmers in the employ of respondent, namely the six members of the Union who went on strike and who are specifically referred to in the complaint, *i. e.,* Baliber, Berteaux, Costella, Cimarusti, Quinn and Sardo; the three women Usher, Lembke and Richard; and Swartz, Litwin and Thain, it is obvious that the Union does not represent a majority. No contention is made that it represents any other than the six persons referred to in the complaint. Therefore, assuming without conceding that the cutters, slopers and trimmers constitute the appropriate unit, as found by the Board, the Union represents but fifty per cent of this group and falls short of a majority by the margin of one per cent. Although the proposition is self-evident, we will presently cite authorities to the effect that a majority requires at least fifty-one per cent of the unit claimed to be appropriate. Therefore, on any theory, whether the appropriate unit is the entire plant and all of the production employees of respondent (approximately 120 persons), or the entire cutting department (including the bundlers), and consisting of a total of sixteen persons, or the cutters, slopers and trimmers, as found by the Board, consisting of twelve persons, the Union does not have a majority.

ARGUMENT AND POINTS AND AUTHORITIES.

I.

A Unit Consisting of the Cutters, Slopers and Trimmers Cannot Be the Appropriate Unit, as the Evidence Shows That Slopers and Trimmers Are Not Admitted to Membership in Cutters Local No. 84 of International Ladies' Garment Workers' Union.

The unit found by the Board to be appropriate consists of all of the cutters, slopers and trimmers. The slopers and trimmers are Eunice Usher, Dorothy Richard and Katherine Lembke. [R. 135; 137-138; 297.] Slopers and trimmers are not admitted to membership in the Union. Harry Scott, organizer and cutters representative, so testified. [R. 201.] His testimony is as follows:

> "Q. Now, there has been some testimony here concerning an employee who performs what they call a sloping operation. Do employees who perform sloping operations,—are they taken into the cutters union? A. No, sir.
>
> Q. And why not? A. Because of their lack of ability to do anything other than that.
>
> Q. You don't recognize them as cutters? A. No, sir.
>
> Q. I think there has been some testimony about trimmers. Are trimmers taken into your organization? A. At one time, when we were taking in assistant cutters, we attempted to consider trimmers, but that was overruled and trimmers are not classified as properly qualified to be cutters.
>
> Q. And that is the situation at the present time? A. Yes."

George Wishnak, organizer for and representative of the International Ladies' Garment Workers' Union, and in charge of the dress department, testified to the same effect. [R. 226.] His testimony is as follows:

"Q. Are you familiar with the job of sloping? A. Yes, sir.

Q. Do you know what that is? A. Yes, sir.

Q. Do you know whether or not a sloper is admitted to the Cutters Local? A. No, sir.

Trial Examiner Erickson: Read that question and answer, please.

(The question and answer were read.)

Trial Examiner Erickson: What is your answer now? You don't know?

The Witness: No. I say they are not admitted.

Trial Examiner Erickson: All right.

Q. (By Mr. Nicoson.) Are you acquainted with the trimmer? A. Yes, sir.

Q. Do you know what that means? A. Yes, sir.

Q. Are trimmers admitted to the Cutters Local? A. They are not."

Both Scott and Wishnak were called by the Board as witnesses for and on behalf of the Board, and the foregoing testimony was given on their direct examination.

The slopers and trimmers, Usher, Richard and Lembke, according to the uncontradicted testimony of the Board's own witnesses, are not eligible to membership in the Union found by the Board to be the representative of the appropriate unit. It is inconceivable upon what theory this finding can be justified. It seems too plain for argument that if the slopers and trimmers are not admitted to membership, that the Union is not qualified to act as their representative. Any other conclusion is impossible.

II.

All Production Employees Consisting of Operators, Finishers, Pressers and Cutters Constitute the Unit Appropriate for Collective Bargaining.

Justin McCarty, Inc. (and companion cases), 36 NLRB 800;

S. Cohen and Sons, 4 NLRB 720-724;

Clinton Garment Company, 8 NLRB 775;

French Maid Dress Co., 5 NLRB 325;

Century Mills, Inc., 6 NLRB 807;

Solomon Mfg. Co., 3 NLRB 926;

Segall-Maigen, Inc., 1 NLRB 740.

The foregoing cases involve employers engaged in the business of manufacturing ladies' garments, as is respondent here. No attempt has been made to cite the countless other decisions of the Board, involving other trades and industries, in which it has been held that all production employees constitute the appropriate bargaining unit.

In the three companion cases of *Justin McCarty, Inc., Morton Davis Co.*, doing business as *Donovan Mfg. Co.*, and *Kohen-Ligon-Folz, Inc.*, 36 NLRB, page 800 *et seq.*, decided Nov. 10, 1941, the identical issue was presented. The cutters' local of the International Ladies' Garment Workers' Union (the same Union as is here involved) contended that the cutters constituted an appropriate unit. The respondent companies contended that all production employees constitute a single appropriate unit. The Board held that as the International had organized plants of the company's competitors on an industrial basis and had contracts with such companies for their production em-

ployees, that an industrial unit was appropriate for bargaining and that a unit restricted to cutters was inappropriate. The facts involved in *Justin McCarty, Inc., et al.,* are identical with those of the instant case.

It is submitted that the facts in the instant case do not warrant a finding that the cutters alone constitute the appropriate unit, and that on the contrary, in determining the unit that all production employees, including cutters, operators, pressers, examiners, drapers, cleaners, pinkers and finishers, should be considered, as was held in the *Morton Davis Co., Justin McCarty, Inc.* and *Kohen-Ligon-Folz, Inc.,* cases.

The result of the strike called on July 24, 1941, conclusively demonstrates that only approximately twenty out of approximately one hundred twenty of respondent's production employees were in sympathy with the Union and the strike; that one hundred of its employees did not leave their work; that only six out of all of respondent's employees are represented by the Union. [R. 654, 655.] It seems manifestly unfair to require respondent to bargain with an organization representing only one-twentieth of the total production employees of its factory.

It is submitted that to require respondent to bargain with an organization representing such an infinitesimal part of respondent's total production employees would not be in furtherance of the objects and purposes of the National Labor Relations Act.

Counsel for the Board, at page 13 of their brief, state that the question of the appropriateness of the unit was not raised by respondent until the hearing. This is not a correct statement. Respondent's letter of September 11, 1941, to D. C. Sargent, Field Examiner of the National Labor Relations Board [Resp. Ex. 3A, R. 582, 583], ex-

pressly states that respondent considers its entire shop as a unit appropriate for the purpose of collective bargaining, and that it does not consider the cutters as a separate unit. This letter was written in reply to Mr. Sargent's letter of August 13, 1941 [Resp. Ex. 2A and 2B, R. 579, 580, 581], in which letter respondent was asked to state its position concerning the question of the unit. The statement in petitioner's brief that the inappropriateness of the unit claimed by the Union was an afterthought and not raised until the time of trial is clearly contrary to the evidence.

One further point should not be overlooked. The unit claimed by the Union to be appropriate has always been one consisting of the cutters only and Sokol's letters to respondent in which he requested respondent to bargain with the Union stated that the Union claimed to be the representative of the cutters. [Board's Ex. 7, 8 and 9, R. 251, 255 and 257.] The Union has never claimed or contended that the proper unit was one consisting of cutters, slopers and trimmers, as found by the Board. In fact, it could not, as slopers and trimmers are not eligible to membership in the Union. (See Point I, page 9 hereof.) Consequently, even if we assume that respondent refused to bargain with or recognize the Union as representative of the cutters, its refusal so to do was not an unfair labor practice as that unit, *i. e.,* the cutters alone, has not been found by the Board to be the appropriate unit. The Board has found that the appropriate unit is one consisting of cutters, slopers and trimmers. [R. 74.] Respondent was never requested to recognize or deal with such a unit. The Board has acknowledged this fact and has found that the appropriate unit is not the unit for which the Union has contended. [R. 76, not 15.] The

Board says this circumstance is immaterial. We submit that on the contrary, it is highly material and completely exonerates respondent of the necessity of recognizing or bargaining with the Union as the representative of its cutters.

III.

The Dependence of Each Production Unit Upon the Other Must Be Considered in Determining the Question of the Appropriate Bargaining Unit.

In the third annual report of the N. L. R. B., page 191, the following statement appears:

> "The functional coherence and dependence of the various departments in mass production industry has often impelled the Board to treat all production and maintenance employees of a given company as a single unit."

In the case of *Acklin Stamping Co.,* 2 NLRB 872, at 877, the Board stated:

> "Although there is some measure of physical separation between the various departments in the plant . . . all function coherently in the completion of a specific order for goods. Each department in turn contributes its share of work to the filling of every order for goods."

In the case of *Fleischer Studios,* 3 NLRB 207, at 211, it was held that where the final product depends on the work of all the departments, a single unit will be appropriate. Similarly, where perfect coordination is required between the various departments, it was held that a single unit was appropriate.

Columbia Broadcast Co., 6 NLRB 166, at 169.

In the *Goodyear Tire & Rubber Co.* decision, 3 NLRB 431, at 437, the Board held that the various departments of the employer need not be engaged in similar work in order to be included in a single unit if each department was essential to the proper functioning of the other.

In that case textile workers in a textile factory producing textiles solely for use in the manufacture of tires were included in a unit of rubber workers. In the *American Tobacco Co.* decision, 2 NLRB 198, the Board held that the departments should be separated only where they are entirely independent and can be operated independently of the rest of the plant.

In the *Fisher Body Corp.* decision, 7 NLRB 1083, at 1088, it was held that the fact that various departments in the employer's business are located in the same building is an important consideration in the determination of a single bargaining unit.

At page 14841 of *Prentiss-Hall Labor Service,* the rule is stated as follows:

> "In determining whether or not to combine several departments into one bargaining unit or to set up separate units, the Board seriously considers the nature of the work performed in the various departments under consideration. The dependence of one department on another, the interchangeability of personnel and the working conditions of the department all play a part in the Board's determination."

Respondent submits that the record in this case shows without contradiction that all of its operators are housed in one building; that each of its production departments is dependent upon the other; that no one department func-

tions separately or as an individual unit; that each department must function coherently with the other in the completion of the garment, and that the final production depends upon the work of all of the departments and not on any single unit. No one department can operate separately or entirely independent of the other. It is submitted that within the rule of the foregoing decisions, a single unit of all the production employees of respondent is the only appropriate unit for the purposes of bargaining.

IV.

Employees on Leave Retain Their Status as Employees.

In *United Casting Corp.*, 7 NLRB 129, at 132, the Board held that employees temporarily laid off retain their status as employees. To the same effect are the following Board decisions:

Robbins & Meyers, Inc., 7 NLRB 1119, at 1124;

National Distillers Products Co., 5 NLRB 862, at 865;

Minneapolis Moline Power Imp. Co., 7 NLRB 840, at 844;

National Weaving Co., 7 NLRB 916, at 919;

International Shoe Co., 14 NLRB 86.

The rule of the foreoging decisions definitely requires that David Thain be included in any computation of the employees in the cutting department, notwithstanding the fact that he was on temporary leave of absence. Counsel

for the Board, at page 9 of their brief, footnote 6, state that Thain's name does not appear on the payroll for week ending July 25, 1941 [Bd. Ex. 15B] and that it was not included on the list of employees of the cutting department forwarded to the Regional Office of the National Labor Relations Board on September 11, 1941 [Resp. Ex. 3C, R. 585], and therefore argue that Thain was not an employee on July 22, 1941.

Counsel has neglected to call the court's attention to Bothman's testimony that Thain's name was not on the July payroll for the reason that it was only carried through the first quarter for the purpose of the Social Security records, and as he was still on leave at the beginning of the second and third quarters, his name was not placed on the second quarter (July) payroll, but was restored to the payroll when he returned to work in December 1941. [R. 575.] The obvious reason for not including his name on Respondent's Exhibit 3C mailed to the Regional Office on September 11, 1941, is that he was still on leave at that time. The undisputed evidence shows he was on a leave of absence and that his job would be waiting for him upon his return. [R. 447-450; 452-454; 576.] The Board's finding to the contrary is not supported by the evidence.

V.

Where the Evidence Shows an Established Course of Dealing Between Employees in the Industry and the Union, Such Course of Dealing Is Determinative of the Question of the Appropriate Bargaining Unit.

The Board's attention is respectfully directed to the testimony of Mr. George Wishnak called as a witness on behalf of respondent on January 29, 1942, the last day of the hearing. Mr. Wishnak testified that he was a representative of the International Ladies' Garment Workers' Union [R. 733]; that this Union consists of approximately three hundred locals [R. 734]; that in Los Angeles the cutters are designated as local No. 84, the operators as local 96, the pressers as local 97, and the cloak operators as local 65. [R. 734.] He further testified that he was a representative of the Los Angeles Joint Board composed of said locals 84, 96, 97 and 65. [R. 735.]

A demand to produce the original of an agreement dated August 8, 1941, between the Dress Association of Los Angeles and the International Ladies' Garment Workers' Union and the Joint Board of the City of Los Angeles had been previously made by counsel for respondent upon Mr. David Sokol, attorney for the Union. This original was produced by Mr. Sokol and pursuant to agreement and stipulation of counsel, copies were permitted to be introduced in evidence in lieu of the original in order that the original signed instrument could be retained by the Union. [R. 736.] This agreement is Respondent's Exhibit No. 6. [R. 739-767.]

Paragraph 26 [R. 755] of the agreement specifically provides that "contracts made by the Union with employers who are not signatories to this collective agreement, shall not extend for a period longer than this agreement, *and shall be controlled by this exact agreement.*" (Emphasis ours.)

A reading of the agreement will show that it was entered into in order that dress manufacturers and the cutters, operators, pressers and cloak operator locals could deal and bargain on behalf of employees. It makes provision for wages, hours and working conditions of the cutters, operators, pressers and cloak operators. It clearly appears that as a result of the agreement of August 8, 1941 [Resp. Ex. 6] it is the practice in the industry in the City of Los Angeles that the Union negotiate on behalf of the four locals and not on behalf of the cutters alone. This is emphasized by paragraph 26 of the agreement, previously referred to, in which it is plainly stated that contracts made by the Union with employers who are not signatories to the agreement shall be controlled by "this exact agreement," referring to Respondent's Exhibit 6.

It should be borne in mind that the Union in this case is cutters local 84. None of the other locals, namely, the operators, pressers or cloak operators, are involved in this proceeding. The six employees named in the complaint on file are members only of the cutters local 84. It is apparent that in attempting to force respondent to bargain with this local, the Union is definitely departing from

the custom and practice in the City of Los Angeles, and the plain provisions of the agreement of August 8, 1941.

The rule has been stated by the Board as follows:

> "The recognition through an established course of dealing between an employer and his employees that a certain group of employees should be treated together for the purpose of collective bargaining is an important consideration in the determination of the appropriate unit."
>
> 3rd Annual Report, NLRB page 160.

In *Hyman-Michaels Co.,* 11 NLRB 796, at 798, the Board held that the formation of an employers association to deal with a Union which has successfully organized an industry on an industry-wide basis indicates that such industry-wide unit is appropriate for the purposes of bargaining.

In *American Steel & Wire Co.,* 5 NLRB 871, at 875, the rule is stated that *in determining the appropriate unit, we look not only to the history of collective bargaining with a particular employer, but also to the methods which have been used elsewhere in the same industry.*

A case strikingly similar in point of fact is that of *Sheba Ann Frocks,* 3 NLRB 97, at 100, in which the Board pointed out that it appeared from the evidence that the Union always negotiated for the four classes of employees under consideration as a group. The same is true in our case. It appears without contradiction that the International Ladies' Garment Workers' Union negotiates

through its Joint Board on behalf of locals 97, 96, 84 and 65, the operators, pressers, cutters and cloak operators. As stated in the *Sheba Ann Frocks* decision:

> "The fact that an employers' association deals with a Union for the employees of its various members is often an indication that the industry-wide employer unit is appropriate for the purposes of collective bargaining."

It seems clear from the foregoing authorities that where the Union in dealing with other manufacturers in the industry has itself recognized that the cutters, operators, pressers and cloak operators taken together are the appropriate unit, and where this practice has resulted in a written agreement between the Joint Board of said locals and an association of dress manufacturers, that the question of the appropriate unit can be answered in only one way; that is, the proper unit is one consisting of each of the four crafts and not the cutters alone. The same situation was involved in the *Morton Davis Co., Justin McCarty, Inc.,* and *Kohen-Ligon-Folz, Inc.,* cases, reported in 36 NLRB, pages 169, 170 and 171. The Board there held that as the Union had organized competitors of respondents on an industrial basis, thereby acknowledging a plant-wide unit as ultimately appropriate for bargaining, that a unit of the cutters *alone* was not appropriate. These decisions are squarely in point with the instant case and respondent submits that the Board by its own precedents is compelled to hold that the claimed unit consisting solely of the cutters is inappropriate, particularly where, as here, respondent's competitors have been and are being organized as the basis of a plant-wide unit, pursuant to the agreement of August 8, 1941. [Resp. Ex. 6.]

VI.

It is Not an Unfair Labor Practice for an Employer to Refuse to Bargain With an Organization Which in Fact Is Not the Authorized Bargaining Agency of the Employees.

The evidence clearly shows that on no possible theory is local 84, the cutters union, the proper and authorized bargaining representative of respondent's employees. This is true whether the bargaining unit be considered as all of the production employees of respondent, or all the employees of the cutting department, or all of the cutters, slopers and trimmers, as found by the Board. In neither case does the Union represent a majority.

The rule is stated in *Texarkana Bus Co. v. N. L. R. B.*, 119 Fed. (2d) 480 (C. C. A. 8), as follows:

> "The employer cannot be required to devote his time to negotiating with every individual claiming to represent a bargaining unit, and cannot be charged with unfair practice in this regard unless there is presented to him evidence of a substantial character, showing that the representative is in fact an authorized bargaining agency."

To the same effect is *Empire Furniture Co. v. N. L. R. B.*, 107 Fed. (2d) 92 (C. C. A. 6.)

As to whether or not the Union ever represented a majority, it is submitted that even if the cutters, slopers and trimmers alone are considered as the appropriate unit, which, however, is not conceded, the Union never represented a majority for the reason that there were twelve persons within this unit, namely, the nine men and the three women, and the Union represents only six,—or fifty per cent. It has been held by the Board in the

matter of *Monte Glove Co., Inc.,* 17 NLRB 25, that fifty per cent does not constitute a majority and that more than fifty per cent or at least fifty-one per cent is needed for a majority.

VII.

Respondent Cannot Be Required to Reinstate Joe Sardo by Reason of His Having Been Convicted of a Felony.

Joe Sardo, one of the persons named in the complaint, admitted that he was convicted of a felony, to-wit, grand larceny, in the State of Wisconsin, and was sentenced to and served a term of fifteen months. [R. 318.] The record will further show that the crime of grand larceny for which Sardo was convicted consisted of the stealing of twenty suits of clothes of the value of $400.00, said clothes being the property of Sullivan Brothers. [R. 630.] On the day that Sardo testified and admitted his conviction [R. 318], respondent did not have available certified or exemplified capies of the record of conviction. Later in the proceedings, however, this record was obtained and was offered in evidence, but was refused upon the ground that it would be cumulative. [R. 631-632.] The trial examiner expressed some question as to the materiality of this evidence. There can be no doubt as to the materiality and admissibility of evidence of conviction of a felony. It is one of the methods of impeaching a witness. It is so provided by *Section 2051 of the Code of Civil Procedure of the State of California,* which reads as follows:

> "A witness may be impeached by the party against whom he was called by contradictory evidence or by evidence that his general reputation or truth, honesty or integrity is bad, but not by evidence of particular

> wrongful acts, *except that it may be shown by the examination of the witness, or the record of the judgment that he has been convicted of a felony.*" (Emphasis ours.)

The witness, Joseph Sardo, therefore, stands impeached by his own admission that in 1937, in the State of Wisconsin, he was convicted of the crime of grand larceny, a felony, and accordingly his testimony should be entirely disregarded.

The fact that Sardo has been convicted of a felony is important for another reason. The rule is well settled by decisions of the Circuit Court of Appeals that an employee convicted of a felony or even of a lesser crime is not entitled to reinstatement, and that an employer has the right to refuse to re-employ or reinstate one who has been convicted of a crime. Nor is it necessary, under the decisions, that the conviction arise out of any act or occurrence committed during the course of the current labor dispute.

In the case of *N. L. R. B. v. Federal Bearings Co.*, 109 Fed. (2d) 495 (C. C. A. 2), the court stated as follows:

> "It (the conviction of the crime of petty larceny) is also justification for refusing to reinstate an employee wrongfully discharged under the Wagner Act. See Labor Board v. Fansteel Corp., 306 U. S. 240, at 255."

It should be noted that in the *Federal Bearings* case above referred to, conviction of the crime of petty larceny was held to be sufficient justification for refusing to reinstate an employee. Surely there can be no question but that a conviction of grand larceny, a felony, would be even more justification for such refusal.

The same rule has been announced in *Standard Lime & Stone Company v. N. L. R. B.*, 97 Fed. (2d) 531 (C. C. A. 4), at 535, in which the court states that an employee convicted of a felony is not entitled to reinstatement.

In the matter of *Chesapeake Shoe Co.*, 12 NLRB 832, at 846, the Board announced the same rule, namely, that the criminal record of an employee was sufficient justification for the employer's refusal to reinstate the employee in question.

The decisions have gone even further and have held that an employee guilty of violent and unlawful conduct is not entitled to reinstatement.

See:

Wilson & Co. v. N. L. R. B., 120 Fed. (2d) 913 (C. C. A. 7); and

Nevada Consolidated Copper Co. v. N. L. R. B., 122 Fed. (2d) 587 (C. C. A. 10).

It seems too plain for argument that to force an employer to take back a man who he has recently learned has been convicted of the crime of grand larceny would not only be violative of the rules set out in the foregoing decisions, but would deprive the employer of the right to insist that those working for him be honest and law-abiding citizens and not felons and ex-convicts.

Mr. Bothman testified that he first learned of the fact that Sardo had been convicted of a felony a few days after the commencement of the strike on July 24, 1941; that he did not know of the fact previous to that time, and that his refusal to offer reinstatment to Sardo was because of the fact that he had learned that Sardo had been convicted of the crime of grand larceny. [R. 630, 632, 824-825.] The finding that Sardo's criminal record

was not the reason for refusing him reinstatement [R. 80] is not supported by the record; in fact, it is diametrically opposed to the uncontradicted evidence. It is submitted that respondent was entirely justified in its refusal to reinstate or re-employ Sardo, by reason of his conviction of a felony, and that it cannot and should not be compelled to reinstate him.

VIII.

The Alleged Unfair Labor Practices.

The complaint charges respondent with having sought to ascertain whether persons seeking employment with it were interested in or affiliated with any labor organization. In this connection, it is significant to note that not one witness testified that Bothman or anyone else ever stated that they would not be hired if they belonged to a union, or that they would be discharged if they joined a union. The only witness who testified that he was asked whether or not he belonged to a union was Cimarusti. He admitted, however, that Bothman did not tell him that he would not be employed if he belonged to a union, or that he would be discharged if he joined a union. [R. 151, 158.]

Quinn did not testify that he was questioned concerning the Union prior to his employment, nor did Berteaux or Costella or Sardo. On the contrary, Costella stated on cross-examination that no one ever told him that he would not be hired if he belonged to the Union, or that he would be fired if he joined. [R. 312-313.] Sardo was not asked concerning this subject and gave no testimony on the point.

Baliber testified that he had been a member of the Union since 1926, and that he belonged to the Union

when he went to work for respondent in November, 1939. [R. 303.] He testified on cross-examination that although he was a Union member at the time he was hired, that no one ever questioned him about the Union, and no statement was ever made to him that he would not be hired if he belonged to the Union, or that he would be fired if he subsequently joined. [R. 307.]

Bothman denied positively that he ever made any anti-union statements. [R. 634, 635, 647, 648.] In this condition of the record, it is submitted that subdivision (a) of paragraph 9 of plaintiff's complaint, in which it is charged that respondent sought to ascertain and ascertained whether persons seeking employment with it were interested in or affiliated with any labor organization, is not supported by the evidence.

In this connection, we call the court's attention to the case of *Press Co., Inc. v. N. L. R. B.,* 118 Fed. (2d) 937 (Dist. of Columbia), in which it is held that although the ediotrial director of the employer's newspaper referred to the union as a "God damn union" and called its members "rats," and otherwise made known his bias against union, that nevertheless, as it did not appear that the employees had anything to fear because of their union activities or that any threats of discharge were made, that a finding of unfair labor practice and interference with the right of employees to organize was not supported by substantial evidence. In our case, the record is absolutely barren of any testimony that Bothman or anyone else ever stated to any person that they would not be hired if they belonged to a union, or that they would be discharged if they joined a union. Consequently, as in the *Press Co., Inc.* case, it does not appear that any of the employees had anything to fear because of the union ac-

tivities or that use was made of the economic threat of discharge. Consequently, the finding of unfair labor practices and of interference with the right of employees to self-organization is not sustained by substantial or any evidence.

Counsel for the Board lay considerable stress upon two meetings of the men cutters on June 11 and June 13, 1941, respectively. It is significant to note that Vito Cimarusti testified in considerable detail as to statements alleged to have been made by Samuel Bothman, secretary of respondent corporation, in which the Union and its officials were claimed to have been vilified and generally referred to in a derogatory manner. Don Quinn testified substantially to the same effect. At both of these meetings, all six of the cutters named in the complaint were present and in addition, Mort Litwin and Louis Swartz. Litwin and Swartz denied that such statements were made by Bothman. [R. 468, 469, 470, 471, 477, 478, 529, 530, 531.] Bothman himself denied that he made such statements. [R. 634, 635.] To this point we have a clear conflict in the evidence which possibly could be resolved by the Board either in favor of or against respondent. However, it should be borne in mind that although the other cutters named in the complaint, namely, Baliber, Berteaux, Costella and Sardo, were called to the stand by counsel for the Board, *they were not asked one single question as to what conversations took place at these meetings or what was said by Mr. Bothman, and they did not testify at all as to any of the statements claimed to have been made by Bothman, as testified to by Cimarusti and Quinn.*

It is apparent that the four cutters referred to were not asked concerning these alleged remarks of Bothman's,

and gave no tetstimony on the point for the reason that such statements were never made by Bothman. Counsel for the Board or for the Union would certainly have called upon Baliber, Berteaux, Costella, and Sardo to corroborate the testimony of Quinn and Cimarusti if they were able to do so. They were not asked the questions and they gave no such testimony. It is submitted that there is no substantial evidence to support the charge in the complaint or the findings of fact with respect to the alleged derogatory statements made by Bothman.

A. Respondent Is Not Bound by the Alleged Statements or Activities of Louis Swartz.

It is charged in subdivision (b) of paragraph 9 that Swartz likewise made derogatory statements concerning the Union and labor organizations generally. At the hearing, objection was made to any testimony concerning statements or conversations by Louis Swartz upon the ground that he was not an officer, agent or representative of respondent, and that he had no authority to bind respondent by any statements or declarations, and that any such statements or declarations made by him not in the presence of an officer, agent or representative of respondent were hearsay. Swartz was a cutter in the employ of respondent occupying no different position than any of its other cutters, and respondent certainly is not bound by any expressions of opinions made by its employees. The objections were overruled and the questions were permitted and the answers allowed to stand. It is submitted, however, that such testimony was clearly hearsay and not binding on respondent and that there is not one scintilla of evidence in the record purporting to show any authority, express or implied, on the part of Swartz to

make any of the statements or declarations attributed to him. On the contrary, the uncontradicted testimony of Swartz and of Bothman shows that he had no such authority. Swartz testified as follows [R. 536]:

"Q. Did you tell Mr. Bothman that you were going to ask Mr. Quinn to come out to your house to talk to him? A. No, I hadn't.

Q. Did Mr. Bothman have any idea that you had done that? A. No.

At page 538:

"Q. Prior to sending the message to Mr. Quinn and prior to talking to him, had Mr. Bothman asked you to contact any of the boys or talk to them? A. No, he hadn't.

Q. Had any other officer or representative of Lettie Lee, Inc., asked you to do that? A. No.

Q. After talking to Mr. Quinn, did you at any time tell Mr. Bothman what you had done? A. Yes, after the following day I told Mr. Bothman what I had done.

Q. What did Mr. Bothman say? A. Well, he asked me why I did it. And I said that regardless of what he thinks, I still think that Don Quinn was just swayed by the mob, and that if he was sorry, that he would come back to work. I thought personally that he did want to go back to work, but he was just afraid.

Q. What did Mr. Bothman say?

* * * * * * * *

Q. (By Mr. Shapiro.) What did Mr. Bothman say after you had told him that you had talked to Mr. Quinn? A. *Well, he told me I shouldn't have done it.*" (Emphasis ours.)

At page 540:

"Q. Did you tell Mr. Bothman that you were going to talk to Mr. Cimarusti? A. No, I didn't tell him at this time, but just when I got through with the call, Mr. Bothman walked over, and he happened to hear the tail end of the conversation. And I told him who I had called and what I had done.

Q. What did he say? A. Well, he just didn't say anything. He walked away. I probably would have gotten the same answer as the first time I told him."

Bothman did not approve of Swartz' conduct.

At page 539:

"Q. (By Mr. Shapiro.) What did Mr. Bothman say after you had told him that you had talked to Mr. Quinn? A. *Well, he told me I shouldn't have done it.*" (Emphasis ours.)

Bothman never authorized Swartz to talk to any of the men concerning union activities and, in fact, told him it was none of his business.

At page 648:

"Q. (By Mr. Shapiro.) Now, Mr. Swartz has testified that he talked to Mr. Quinn at his home. Did you know that Mr. Swartz was going to talk to Mr. Quinn? A. No, I didn't, but I know he did talk to him, because he told me of it later on.

Q. Did Mr. Swartz tell you before he spoke to Mr. Quinn that he was going to talk to him about coming back to work? A. No.

Q. Did you ever authorize or instruct Mr. Swartz, or anyone else, to talk to any of these men? A. I did not."

At page 649:

> "Q. (By Mr. Shapiro.) What did you tell Mr. Swartz, when he told you that he had talked to Mr. Quinn? A. *I told him he had no business going out there, that it was none of his business, that I was taking care of the situation between the employees and Lettie Lee.*" (Emphasis ours.)

Respondent's motion to strike all of the testimony concerning the alleged statements made by Swartz was denied. It is the position of respondent that none of said evidence was admissible, and that the same should have been stricken. Determinative of this point is the recent decision in the matter of *Humble Oil & Refining Co. v. N. L. R. B.*, 113 Fed. (2d) 85 (C. C. A. 5). The rule is stated as follows:

> "As to mere foremen who were themselves eligible to membership in the employee organization, we adhere to what was said in N. L. R. B. v. Whittier Milk Co., 111 Fed. (2d) 474 (6 L. R. R. M. 790): When not speaking in the exercise of their authority nor with the knowledge or approval of the employer, but in discussion of employee affairs on their own responsibility, they are within their personal rights of free speech."

Swartz was eligible to membership in the Union, and in fact was invited to join. [R. 531.]

It should also be noted that Swartz had no authority to hire or fire. He testified as follows [at page 526]:

> "Q. Do you have the power to hire any employees independent of anyone else in the factory? A. No.

I interview them and I might recommend to Mr. Bothman that he put them on.

Q. What is the situation with respect to discharging employees? Do you have that right? A. Well, I don't know. I have never tried that right.

Q. You have never fired anyone? A. I have never fired anyone, so I don't know if I have that right or not."

Bothman testified as follows [at page 650]:

"Q. All right. Now, has Mr. Swartz at any time had the authority to hire or fire employees? A. He has not.

* * * * * * * *

Q. (By Mr. Shapiro.) To your knowledge, has Mr. Swartz ever discharged or fired an employee? A. Not that I know of.

Q. Has Mr. Swartz ever hired an employee, without first obtaining your permission? A. I don't think so. Not that I know of."

There is no evidence in the record of any authorization, express or implied, to Swartz to act on behalf of respondent or to speak for it or to discuss labor relations with any of the cutters. Consequently, any conversations or statements of Swartz were an exercise of his personal right of free speech, and were in no way binding upon respondent, and the objections to the introduction of such testimony should have been sustained and the testimony itself should have been stricken upon respondent's motion.

B. The Increase in Wages Given to the Cutters at Their Request Was Not an Unfair Labor Practice.

Subdivision (c) of paragraph 9 charges respondent with having raised the wages of its cutters for the purpose of discouraging membership in the Union. This allegation is likewise without support in the record. The testimony of Bothman and of Swartz establishes without contradiction that the meeting of June 11, 1941, was called at the instance and request of the men cutters [R. 527, 528, 633]; that they asked for the raise, and that Bothman stated that he would either grant them an increase of fifteen cents an hour or pay them time and a half for overtime. [R. 529, 633.] They were told to think the matter over and let him know their decision. [R. 634.] Two days later, on June 13, Bothman was informed that the cutters had arrived at a decision and that they had decided to accept the increase. Later in the afternoon of that day, Bothman met with the men and told them that the increase would be fifteen cents an hour, retroactive to the first of that week. It should be borne in mind that at this time none of the cutters named in the complaint, with the exception of Baliber, were members of the Union. Union cards were not signed by the persons named in the complaint until the latter part of July, 1941, long after the wage increases were requested and given.

There is no testimony that in June, 1941, any disputes existed between the cutters and respondent, or that the subject of union affiliation was even being considered by the cutters. It is uncontradicted in the record that the subject of an increase in wages originated with the employees and was communicated to Bothman who enter-

tained the request and granted the increase. It certainly cannot be said under these circumstances that the increase was given for the purpose of discouraging membership in the Union. The court in this Circuit in the case of *N. L. R. B. v. Sterling Electric Motors,* 109 Fed. (2d) 194, has held that the granting of a wage increase to employees as a result of direct negotiation between the employees and the employer is not an unfair labor practice. At page 209, the court states as follows:

> "If the inference of an attempt to violate the Act were permitted under the circumstances of this case, all employers would be *in terrorem* in granting any improvement in their employees' conditions during the long period in which attempts, often by rival unions, were being made to organize them. We do not believe that Congress intended such a construction of an act to benefit the conditions of laboring men."

This language is particularly appropriate in the instant case and completely disposes of the Board's contention that the granting of a wage increase to certain of the employees as a result of their request therefor was an unfair labor practice.

C. The Other Alleged Unfair Practices.

Concerning the allegations of subparagraph (d) of paragraph 9, it appears that Bothman on several occasions requested certain of the employees to return to work. [R. 639, 641, 644, 646, 647.] He stated on the stand that he has been at all times and was then ready and willing to take back all of his former employees (with the exception of Sardo). That he is under no obligation to reinstate Sardo has already been fully discussed. Bothman testified that there was not sufficient work available

for all of his former employees because of conditions in the industry and lack of business. [R. 644.] The rule is well established that the Board may not order reinstatement if no work is available, or if it is being done by other regular employees. It has been so held in *Union Drawn Steel Co. v. N. L. R. B.,* 109 Fed. (2d) 587 (C. C. A. 3).

In paragraph 11, respondent is charged with having refused to reinstate the six employees named in the complaint for the reason that they had designated the Union as their representative. It is significant to note that subdivision (d) of paragraph 9 charges respondent with having solicited these same employees to return to their work. Paragraph 11 thus directly contradicts subdivision (d) of paragraph 9. It is submitted that the record does not support the allegations of paragraph 11, and that there is no showing that reinstatement was refused to any employee because of his Union activities. It would appear that the allegations of paragraph 11 and of subdivision (d) of paragraph 9 are so diametrically opposed and so inconsistent, one with the other, that the same should be completely eliminated from consideration. Certainly, the Board should be required to take a definite stand either one way or the other. Respondent either solicited the employees to return to work or it refused to reinstate them. Both situations could not exist at the same time.

Counsel for the Board make much ado over the circumstance that Mr. Sokol, attorney for the Union, wrote two or three letters to Mr. Bothman and attempted on several occasions to reach him by telephone, and that Bothman did not reply to his letters or answer his calls.

The point is of no significance. The letters referred to were written in the month of September, long after the commencement of the strike and at a time when Bothman knew that only twenty of respondent's employees out of a total of approximately one hundred twenty had responded to the strike call. He testified that he did not answer the letters for two reasons—first, that he did not believe that Sokol was the authorized representative of respondent's employees [R. 586], and second, that on September 11, 1941, he replied by letter to an inquiry from Mr. D. C. Sargent of the National Labor Relations Board, 21st Region, concerning respondent's position, and stated that respondent considered its entire shop as a unit appropriate for the purpose of collective bargaining and did not consider that the cutters alone constituted the proper unit. [Resp. Ex. 3A, R. 582.] Bothman furnished to Mr. Sargent at the same time all other information and data requested by Mr. Sargent, as will appear from the letter of September 11, 1941, together with the enclosures attached thereto, all of which are in evidence as exhibits on behalf of respondent. [Resp. Ex. 3A, 3B and 3C, R. 582, 583, 584, 585.] Bothman testified that he considered that he had done all that he was called upon to do when he advised Mr. Sargent of the National Labor Relations Board of the position of his company with respect to the appropriate bargaining unit. [R. 587.] Mr. Sargent was present in the hearing room while Bothman was testifying. He was not called to the stand by counsel for the Board, and as Bothman's testimony was not controverted it must, therefore, be conceded that his narrative of the events was true and correct. It is submitted that under these circumstances, the Board's finding that respondent wrongfully refused to bargain finds no support in the record.

As to the hearsay testimony that a telephone operator informed Sokol that Bothman would not answer his calls, the case of *N. L. R. B. v. Sterling Electric Motors,* 109 Fed. (2d) 194 (C. C. A. 9), completely disposes of this point raised by the Board in its brief. At page 209, the court states:

> "We doubt whether in any event a failure to make an appointment in response to telephone calls of a labor organizer, or anyone else, where there is no sudden emergency, is a violation of the Act.

Thus, the matter of Mr. Sokol's letters and his alleged telephone calls may be eliminated from further consideration.

Another point is significant. Mr. Sokol testified on cross-examination by counsel for respondent that all of his communications were addressed to the attention of Mr. Bothman and all of his efforts to contact a representative of the company by telephone were likewise directed to Mr. Bothman. He admitted that he did not at any time attempt to make any effort whatsoever either by letter, telephone or otherwise to communicate with any other officer or representative of respondent. He admitted that he knew that respondent was a corporation and that it had other officers and representatives besides Mr. Bothman. [R. 262-3.] Having failed to communicate with Mr. Bothman, it would have been a simple matter for him to have at least made some effort to contact any one of the other officers of respondent corporation. By his own admission, he made absolutely no effort to do so.

IX.

The Right of Free Speech and Expression.

On the question of the right of the employer to express his opinions concerning unions and as to whether or not such expressions constitute unfair labor practices, we direct the court to the recent decision of the United States Supreme Court in *National Labor Relations Board v. Virginia Electric & Power Co.,* 314 U. S. 469, in which the Supreme Court held that employers' bulletins and speeches of its representatives warning employees that they would be discharged for "messing with the CIO" and other like statements were not unfair labor practices under the Act.

Other decisions to the same effect are *N. L. R. B. v. Lightner Publishing Co.,* 113 Fed. (2d) 621 (C. C. A. 7), in which the court states as follows:

> "No expression of an employer's opinion as such on any subject can constitute an unfair labor practice; and obviously the N. L. R. B. has no authority to interfere with an employer's untrammeled expression of views on any subject."

In the case of *Humble Oil & Refining Co. v. N. L. R. B.,* previously cited, the rule is recognized that "the Constitutional right of free speech extends to industrial matters. Thornhill v. Alabama, 310 U. S. 68 (6 L. R. R. M. 697)."

In the matter of *Press Co., Inc., v. N. L. R. B.,* 118 Fed. (2d) 937 (Dist. of Columbia), to which case reference has been previously made, the rule is stated as follows:

> "But giving due weight to the normal and natural effect of his statements (referring to the editor's

> reference to the union as a 'God damn union' and to its members as 'rats') we are nevertheless of the opinion that, without more, the Board was not justified in finding that alone that constituted an unfair labor practice. The labor law does not prohibit the right of an opinion on the part of the employer nor the expression of it. (Citing cases.) Before oral statements of an employer may be held to be an unfair labor practice, it must appear that they interfered with, restrained or coerced employees in the rights guaranteed by the Act; that is to say, the right to join labor organizations, to bargain collectively, and to engage in concerted activities. But nothing that Lewis is quoted as having said, nor the surrounding circumstances, conveys the idea that the employees had anything to fear because of their union activities. . . . No witness suggests that there was at any time any use of or even the suggestion of the economic threat of discharge. . . ."

We find an exact parallel in the instant case. No witness testified or even suggested that there was at any time any use or suggestion of the economic threat of discharge. As previously pointed out, there is not one iota of evidence in the record that Bothman or anyone else ever stated to anyone that they would not be hired if they belonged to the Union, or that they would be discharged if they joined the Union.

In the case of *N. L. R. B. v. Ford Motor Co.*, 114 Fed. (2d) 905 (C. C. A. 6), the same rule is stated. It was there held that the order of the Board that the employer cease "circulating and distributing or otherwise disseminating among its employees statements or propaganda which disparages or criticizes labor organizations, or which

advises its employees not to join such organizations," was invalid and violated the right of free speech guaranteed to the employer by the First Amendment to the Federal Constitution. The court further held that the finding of the Board that the employer engaged in unfair labor practices by distributing said literature to its employees was not supported by substantial evidence.

It is respectfully submitted that the findings of the Board that respondent engaged in unfair labor practices are not supported by the evidence, and in so far as the same pertain to expressions of the employer's opinions, that the same are violative of the right of free speech guaranteed by the first amendment to the Federal Constitution.

X.

The Petition Does Not Allege That Respondent Is in Default or Has Failed to Comply With the Board's Order, and It Therefore Is Insufficient on Its Face and Should be Dismissed.

Unless the petition affirmatively shows that respondent is in default and has violated the Board's order, it fails to state sufficient facts to entitle petitioner to any relief and should be dismissed.

The petition on file contains no such allegations.

As stated in *N. L. R. B. v. La Salle Hat Co.,* 105 Fed. (2d) 709 (C. C. A. 3) at 710:

> "But it is not alleged that respondents are disregarding the Board's order, or have failed to comply with its provisions."

The petition was dismissed.

In *N. L. R. B. v. Friedman-Harry Marks Clothing Co.*, 83 Fed. (2d) 731 (C. C. A. 2) at 733:

> "It follows that the petitions were invalid for several reasons:
>
> * * * Second, they were insufficient on their face because they did not allege that the respondent was in default."

It is respectfully submitted that the petition should be dismissed.

Conclusion.

It is respectfully submitted that the Board's findings are not supported by substantial evidence, that the Board's order is invalid, and that the petition of the Board for enforcement of said order should be denied and that an order should be made directing that the complaint be dismissed in its entirety.

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